

# Publication Rights Agreements in Sensational Criminal Cases: A Reponse to the Problem

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## NOTES

### PUBLICATION RIGHTS AGREEMENTS IN SENSATIONAL CRIMINAL CASES: A RESPONSE TO THE PROBLEM

#### I

#### INTRODUCTION: THE PROBLEM AND A PROPOSED SOLUTION

As a result of the increased focus of public attention on sensational crimes,<sup>1</sup> criminal defendants may capitalize on the media interest in their stories.<sup>2</sup> Publishers are often willing to pay large sums of money to acquire publication rights<sup>3</sup> to a defendant's life story and his alleged role

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<sup>1</sup> See Fedler, *When Headlines Are Bought*, BARRISTER, Fall 1980, at 14 (claiming that prior to the 1960's media attention focused on "stories of famous soldiers, politicians and adventurers . . . . During the 1960s and 1970s, the media began to buy more stories, including stories about sensational crimes. Stories about assassinations were especially lucrative, followed by tales of mass murders, kidnappings and million-dollar robberies.").

<sup>2</sup> See, e.g., S. ATKINS & B. SLOSSER, *CHILD OF SATAN, CHILD OF GOD* (1977) (Susan Atkins' version of Sharon Tate murders); C. CHESSMAN, *TRIAL BY ORDEAL* (1955) (so called "Red Light Bandit" recounting his wait for execution); E. CRAY, *BURDEN OF PROOF: THE CASE OF JUAN CORONA* (1973) (inside account of trial of Juan Corona—provided to author by Corona's attorney through agreement with Corona); *THE DEATH PENALTY* (1975) (television movie about death penalty in which so called "Capeman" murderer, Salvador Agron, was to receive \$2,500 from the movie's proceeds); W.B. HUIE, *HE SLEW THE DREAMER* (1970) (analysis of James Earl Ray's actions before and after he assassinated Martin Luther King); R.B. KAISER, "R.F.K. MUST DIE!" *A HISTORY OF THE ROBERT KENNEDY ASSASSINATION AND ITS AFTERMATH* (1970) (description of events surrounding Sirhan Sirhan's murder of Robert Kennedy); *Taking a Criminal to Civil Court*, NEWSWEEK, Apr. 23, 1979, at 22B (parents of manslaughter victim suing to prevent possible profiting from publication rights agreement); *Selling a Client's Story*, TIME, Jan. 19, 1970, at 62 (Susan Atkins, defendant in trial for murder of Sharon Tate, profiting from interview); *Checkbook Journalism*, NEWSWEEK, Dec. 29, 1969, at 45 (Susan Atkins and her interviewer profiting from sale of interview concerning murder of Sharon Tate); *Ga. Aides Oppose Atlanta Suspect's Legal Fund Plan*, NAT'L L.J., Sept. 14, 1981, at 2, col. 3 (attorneys trying to raise money for defense of alleged murderer, Wayne Williams, by selling rights to his story); Weiser, *Welch Says His Lawyer to Get Legal Fees From Book Profits*, Washington Post, Mar. 29, 1981, at A1, col. 5 (potential proceeds from book contract serves as payment to attorney for defending accused murderer Bernard C. Welch); *Bushwhacked by a Media Mob*, NAT'L L.J., Feb. 2, 1981, at 18, col. 2 (intense media interest in alleged murderer of ex-Beatle John Lennon); Winfrey, *'Son of Sam' Case Poses Thorny Issues for Press*, N.Y. Times, Aug. 22, 1977, at 1, col. 1 (ethical problems posed for press by coverage of "Son of Sam" killings and alleged \$50,000 to \$100,000 requested for taped interviews with alleged "Son of Sam" killer, David Berkowitz). See generally Lieberman & Stewart, *Making Money Off Murder*, STUDENT LAW., FEB. 1982, at 22 (discussing sales by criminals of their stories).

<sup>3</sup> See *infra* note 4 for a discussion of the amounts paid to defendants. The phrase "publication rights" includes newspaper, magazine, movie, television, radio, theater, photograph, and any type of literary right.

in the crime. The defendant in turn can use the money to pay for private counsel, with some defendants even choosing to sell their publication rights directly to their defense attorneys as compensation for legal services.<sup>4</sup>

Opposition to defendants acquiring such money<sup>5</sup> has led twenty-two states to pass statutes<sup>6</sup> requiring that all funds from publication

<sup>4</sup> Publication rights agreements have resulted in a broad range of remuneration. Because the amount of money received from such agreements usually remains private, it is difficult to determine how much is really at stake. Where a writer published three articles in *Look* magazine followed by a book about James Earl Ray, see W.B. HUIE, *supra* note 2, Ray's first lawyer received \$25,000 from the proceeds and his second lawyer, \$165,000. Ray's second lawyer expected \$400,000 but agreed to receive a maximum of \$165,000 when no trial took place due to Ray's guilty plea. *Selling a Client's Story*, *supra* note 2, at 62. Other high figures include: \$800,000 reportedly paid for Patricia Hearst's own story; a \$225,000 contract between F. Lee Bailey and a publisher for Bailey's story about Patricia Hearst, Turner, *Patricia Hearst Drops Attempt to Win New Trial*, N.Y. Times, Jan. 7, 1982, at A15, col. 1; and \$180,000 reportedly paid for the right to David Berkowitz's story, Lieberman & Stewart, *supra* note 2, at 25. Examples on the low end of the range include \$200 paid by the *New York Daily News* for copies of Berkowitz's letters to an earlier girlfriend, Fedler, *supra* note 1, at 15, and \$350 for photographs of Wayne Williams, Lieberman & Stewart, *supra* note 2, at 40. As the examples demonstrate, the amount of money available varies greatly, depending on the public's knowledge of the defendant and the particular publication rights sold.

<sup>5</sup> The author of the New York bill prohibiting convicts from profiting from their stories commented on the rationale behind the statute:

It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

1977 NEW YORK STATE LEGISLATIVE ANNUAL 267 (memorandum of Sen. Gold); see also *Criminals' Revenues From Stories Curbed*, N.Y. Times, Aug. 13, 1977, at 20, col. 3.

The congressional conference committee report on the proposed federal version of the New York statute exhibited the same rationale:

A number of people have expressed concern that the widespread publicity surrounding a crime can result in the criminal wrongdoer receiving lucrative fees for books, articles, interviews and the like. These people see such income on the part of the wrongdoer as unjust enrichment and have proposed that such income be held in escrow by the State in order to pay claims made against the wrongdoer by the victims of the crimes which led to the unjust enrichment.

Victims of Crime Compensation, H.R. REP. NO. 1762, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 124 CONG. REC. 35,736, 35,738-39 (1978).

<sup>6</sup> ALA. CODE § 4-9-80 to -84 (1975); ALASKA STAT. § 18.67.165 (1981); ARIZ. REV. STAT. ANN. § 13-4202 (1978); CONN. GEN. STAT. § 54-218 (1983); FLA. STAT. ANN. § 944.512 (West Supp. 1983); GA. CODE ANN. § 27-3401 (Supp. 1982); IDAHO CODE § 19-5301 (1979); ILL. ANN. STAT. ch. 70, §§ 401-10 (Smith-Hurd Supp. 1982-83); IND. CODE ANN. § 16-7-3.7-1 to .7-6 (Burns 1983); KY. REV. STAT. ANN. § 346.165 (Baldwin 1979); LA. REV. STAT. ANN. § 46.1831-3 (West 1982); MASS. ANN. LAWS ch. 258A, § 8 (Michie/Law. Co-op. 1980); MINN. STAT. ANN. § 299B.17 (West Supp. 1983); NEB. REV. STAT. §§ 81-1836 to -1842 (Supp. 1980); NEV. REV. STAT. § 217.265 (1981); N.Y. EXEC. LAW § 632-a (McKinney 1982); OKLA. STAT. ANN., tit. 22, § 17 (West Supp. 1982-83); S.C. CODE ANN. § 15-59-40 to -59-80 (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (Supp. 1982); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. CIV. CODE ANN. §§ 10-18 (Vernon Supp. 1982-83); WASH. REV. CODE ANN. § 7.68.200-280 (West Supp. 1982).

This note describes the mechanics of New York's version, the first such law, passed in

rights agreements be placed in an escrow account. The statutes generally provide that if the defendant is convicted, the victim of the crime and his family may collect from the account; if acquitted, the defendant receives the funds. Lawyers may draw reasonable attorneys' fees from the account.

The Code of Professional Responsibility further restricts such agreements. The Code prohibits attorneys from making publication rights agreements with their clients prior to the conclusion of "the matter giving rise to [the attorney's] employment,"<sup>7</sup> because of the attorney's conflict of interest between maximizing publicity, and thus profit, and obtaining his client's acquittal.<sup>8</sup> Although generally disapproving of such arrangements, courts have not used the Code prohibition as a basis for reversing convictions or for invalidating a publication rights contract.<sup>9</sup>

Critics argue that these statutes infringe upon a defendant's first amendment rights.<sup>10</sup> Because the statutes diminish the defendant's

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1977. See *infra* note 47. The other states that have passed such statutes have generally followed the New York scheme with some variations. See *infra* note 50.

<sup>7</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1980).

<sup>8</sup> Prior to the conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

*Id.*

Ethical Consideration 5-4 provides the rationale for prohibiting such arrangements:

If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

*Id.* EC 5-4; see also MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8(d) (Proposed Final Draft 1981) (substantially similar to DR 5-104(B)); cf. CALIFORNIA RULES OF PROFESSIONAL CONDUCT 5-101 (1975) (only provision covering such conflicts of interest; no specific analogue to DR 5-104(B)).

California is the only state that has not adopted substantially all of the Model Code of Professional Responsibility. The Model Code, adopted by the ABA in 1970, is in force in substantially the same form in the other 49 states. California chose to draft its own version, which was approved by the California Supreme Court on Dec. 31, 1974, and became effective on Jan. 1, 1975.

<sup>9</sup> See *infra* note 29 and accompanying text. In short, the existence of the contract may violate the attorney's professional responsibility under the Model Code but not the defendant's sixth amendment rights.

<sup>10</sup> See, e.g., Note, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROB. 93 (1978) [hereinafter cited

prospects for profit from his story, they discourage him from revealing protected speech.

Both the first amendment problem with the above statutes and the conflict of interest problem with attorney-client publication rights contracts could be reduced if legislatures enacted statutes that provided for contingent attorney's fees, setting aside a share of the proceeds for attorneys even if the defendant is convicted. The Code of Professional Responsibility prohibits contingent fees in criminal cases,<sup>11</sup> but the main rationale—that such agreements create no *res* with which to pay the fee<sup>12</sup>—does not apply when publication money is available upon acquittal.

## II

### THE RATIONALE FOR PERMITTING PUBLICATION RIGHTS AGREEMENTS BETWEEN CRIMINAL DEFENDANTS AND THEIR ATTORNEYS

The principal justification for allowing a defendant to enter into a publication rights agreement is the defendant's freedom to contract for the attorney of his choice. In *Maxwell v. Superior Court of Los Angeles County*,<sup>13</sup> the California Supreme Court applied this logic in upholding a publication rights agreement between Bobby Joe Maxwell and his attorney.<sup>14</sup> In the agreement, Maxwell's attorney expressly confronted the possible conflict of interest problem by having Maxwell declare that he was cognizant of the potential conflicts but still wished to proceed with his chosen counsel.<sup>15</sup> In reversing the lower court's invalidation of the

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as Note, *Compensating the Victim*]; Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979) [hereinafter cited as Note, *Criminals-Turned-Authors*]; Jones, Constitutional Analysis of Statutes Requiring that Funds Received by Accused or Convicted Criminals for the Story of their Crime be Given to Their Victims (Mar. 30, 1982) (report prepared by Legislative Attorney, American Law Division, for Congressional Research Service, Library of Congress) (on file at Cornell Law Review).

<sup>11</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106; *id.* EC 2-20 (1980).

<sup>12</sup> "Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee." *Id.* EC 2-20.

<sup>13</sup> 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

<sup>14</sup> Maxwell, nicknamed the "Skid Row Stabber," gained public exposure for allegedly killing 10 people on Los Angeles's skid row. See Rawitch, *Calif. Court Upholds Removal of Lawyers for "Stabber" Suspect; Book Deal Cited*, Nat'l L.J., Feb. 25, 1980, at 7, col. 2.

<sup>15</sup> The contract reflects extensive disclosure of possible conflicts and prejudice. It declares that counsel may wish to (1) create damaging publicity to enhance exploitation value, (2) avoid mental defenses because, if successful, they might suggest petitioner's incapacity to make the contract, and (3) see him convicted and even sentenced to death for publicity value. But a catch-all paragraph—after reciting that other, unforeseen [sic] conflicts may also arise—reads: "*The Lawyers will raise every defense which they, in their best judgment based upon their experience feel is warranted by the evidence and information at their disposal and which, taking into consideration the flow of trial and trial tactics, is in*

agreement,<sup>16</sup> the court held: "When the possibility of significant conflict has been brought to the court's attention and the danger of proceeding with chosen counsel has been disclosed generally to the defendant, he may insist on retaining his attorneys if he waives the conflict knowingly and intelligently for purposes of the criminal trial."<sup>17</sup> The court thus elevated Maxwell's freedom to contract and right to the attorney of his choice above the need to prevent potential attorney-client conflicts of interest.

The United States Supreme Court's decision in *Faretta v. California*<sup>18</sup> suggests a related justification for allowing publication rights agreements. The Court in *Faretta* held that a mentally competent defendant may waive his right to counsel and represent himself.<sup>19</sup> Even though the defendant is legally untrained, he may act as his own counsel if he is competent and chooses to do so. The *Faretta* holding suggests that just as a mentally competent defendant may choose to represent himself despite his lack of training, so should he be able to choose his own counsel despite the attorney's conflict of interest. The California Supreme Court in *Maxwell* noted this argument<sup>20</sup> and concluded that "chosen representation is the preferred representation."<sup>21</sup>

A third argument favoring attorney-client publication rights agreements minimizes the unlikelihood of improper representation because of

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*Maxwell's best interests. The Lawyers will conduct all aspects of the defense of Maxwell as would a reasonably competent attorney acting as a diligent conscientious advocate."*

30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179 (emphasis in original).

The defendant waived his attorney-client privilege and promised to supply counsel with extensive information about his life. *Id.* at 610 n.1, 639 P.2d at 250 n.1, 180 Cal. Rptr. at 179 n.1. The agreement also included the names and addresses of other lawyers from whom Maxwell could receive independent legal advice. *Id.* at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.

<sup>16</sup> Maxwell's attorneys had initially shown the contract to the trial judge. After satisfying himself that Maxwell was competent to understand and enter into such an agreement, the trial court still invalidated the agreement on its own motion. In a two-to-one decision, the appellate court affirmed. *Maxwell v. Superior Court of Los Angeles County*, 101 Cal. App. 3d 736 (opinion omitted), 161 Cal. Rptr. 849 (1980).

<sup>17</sup> 30 Cal. 3d at 619, 639 P.2d at 256, 180 Cal. Rptr. at 185.

<sup>18</sup> 422 U.S. 806 (1975).

<sup>19</sup> In *Faretta*, the defendant was charged with grand theft and attempted to waive his right to assistance of counsel. In reviewing a California appellate court holding that the public defender must represent Faretta, the Court held that Faretta could represent himself because he had "clearly and unequivocally declared to the trial judge [weeks before trial] that he wanted to represent himself." *Id.* at 835. Furthermore, "[t]he record . . . show[ed] that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.*

<sup>20</sup> 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182.

<sup>21</sup> *Id.* The *Maxwell* court emphasized that the "[d]efendant's confidence in his lawyer is vital to his defense." *Id.* "[E]ffective assistance is linked closely to representation by counsel of choice. When clients and lawyers lack rapport and mutual confidence the quality of representation may be so undermined as to render it an empty formality." *Id.* at 613, 639 P.2d at 251, 180 Cal. Rptr. at 180.

the attorney's countervailing incentive to represent his client effectively. A lawyer will represent his client to the best of his abilities because the lawyer has a strong interest in maintaining his professional reputation.<sup>22</sup> Although an attorney's self-interest might be served by heightened publicity at the expense of his client, attorneys ideally will realize that their long-term interests are best served by effective representation that enhances their professional reputation.<sup>23</sup>

The final justification emphasizes that such agreements do not violate criminal defendants' sixth amendment right to effective assistance of counsel. In cases where a single attorney represents more than one defendant in the same criminal action, the Supreme Court established a stricter standard for reversal of convictions for ineffective assistance of counsel than a mere finding that a conflict exists.<sup>24</sup> The Court held that "a defendant must establish that an actual conflict adversely affected his lawyer's performance."<sup>25</sup> Both courts<sup>26</sup> and at least one commentator<sup>27</sup> have argued that this test should also apply to publication rights agree-

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<sup>22</sup> In the appellate court opinion affirming the invalidation of the *Maxwell* agreement, Justice Jefferson acknowledged this argument when stating Maxwell's position: "[I]t is argued that [the assumption that a defense attorney has a potential interest in having his client convicted] is clearly rebutted by an attorney's primary interest in maintaining a reputation of professional excellence in his chosen career." 101 Cal. App. 735 (Opinion omitted), 161 Cal. Rptr. 849, 853. See also *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) (noting that alleged conflict of interest presented by F. Lee Bailey's contract to write book on life and trial of Patty Hearst was not total, because "salability of Bailey's book would have been enhanced had he gained an acquittal for Hearst."); Note, *Conflicting Interests in Lawyer-Client Publication Rights Agreements—The Story of Bobby Joe Maxwell*, 42 U. PITT. L. REV. 869, 899 (1981) (suggesting that attorney has strong self-interest in obtaining client's acquittal).

<sup>23</sup> The ultimate question is whether the immediate monetary benefit to the attorney resulting from the publicity outweighs the possible long-term detriment to his professional reputation because of reduced income from law practice.

<sup>24</sup> *Cuyler v. Sullivan*, 446 U.S. 335 (1980), involved representation of multiple defendants in a single prosecution by the same attorney. Such representation results in the attorney serving potentially different interests among defendants, in contrast to publication rights agreements, which result in an attorney serving a defendant's interest that is different from the attorney's own interest.

In *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981), the Ninth Circuit held this distinction "immaterial": "We consider the rules laid down in *Sullivan* to be directly applicable to the present case . . ." *Id.* at 1193. In *Hearst*, Patricia Hearst had agreed to cooperate exclusively with her attorney, F. Lee Bailey, and to refrain from publishing any account of her experiences until 18 months after his book was published. After conviction, she alleged that Bailey had failed to seek a continuance or a change of venue and had improperly put her on the witness stand to maximize publicity in San Francisco. Even though President Carter commuted her seven-year sentence to 20 months, the court granted a new hearing to "apply to the facts the law recently laid down by the Supreme Court in *Cuyler v. Sullivan*." *Id.*

<sup>25</sup> 446 U.S. at 350. For a discussion of the development of this test, see *infra* note 44 and accompanying text.

<sup>26</sup> See, e.g., *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *Maxwell v. Superior Court of Los Angeles County*, 30 Cal. 3d 606, 612, 639 P.2d 248, 256, 180 Cal. Rptr. 177, 180 (1982).

<sup>27</sup> See Note, *supra* note 22, at 884.

ments. In cases in which a conflict of interest does not rise to the level of reversible prejudice, the existence of the conflict should be balanced against the benefit to the defendant of obtaining private counsel of his choice. In view of the increasingly limited public defender resources, and the availability of reversal for ineffective representation due to major conflicts of interest, the balance favors permitting knowing waiver of conflicts in attorney-client publication rights agreements.

### III

#### ARGUMENTS FOR A PER SE INVALIDATION OF ATTORNEY-CLIENT PUBLICATION RIGHTS AGREEMENTS

Although courts have not invalidated publication rights agreements per se,<sup>28</sup> many courts have expressed disapproval of them.<sup>29</sup> In his vigorous dissent in *Maxwell*, Justice Richardson stated that Maxwell faced "the most serious of criminal charges" and "require[d] . . . counsel whose allegiance to him [was] total and unalloyed, free of the subtle, opposing magnetic pull of self-interest or adverse pecuniary advantage. . . . This self-interest . . . is ever present to sway, if unconsciously, the numerous decisions of counsel both pretrial and during trial."<sup>30</sup> A defendant who wishes to waive the possible conflicts of interest of his attorney cannot foresee all the situations in which those conflicts may affect his attorney. In *Maxwell*, Chief Justice Bird asserted that mere knowledge of potential conflicts is insufficient "to enable a person untrained in the law to make a truly knowing and intelligent

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<sup>28</sup> The lower *Maxwell* courts applied a per se rule of invalidation, but the Supreme Court of California reversed them. *Maxwell v. Superior Court of Los Angeles County*, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

<sup>29</sup> See, e.g., *United States v. Hearst*, 638 F.2d at 1197-98 (9th Cir. 1980) ("Moreover, all courts before which the issue has been raised have disapproved the practice of attorneys arranging to benefit from the publication of their clients' stories."); *Wojtowicz v. United States*, 550 F.2d 786, 793 (2d Cir.) ("While we do not regard the practice worthy of emulation, we cannot say that it rendered counsel's representation constitutionally defective."), *cert. denied*, 431 U.S. 972 (1977); *Ray v. Rose*, 535 F.2d 966, 974 (6th Cir.) ("Despite our disapproval of such a fee arrangement, however, its existence does not necessarily mean that Ray was denied effective assistance of counsel."), *cert. denied*, 429 U.S. 1026 (1976); *Ray v. Rose*, 491 F.2d 285, 289 (6th Cir.) ("We are not willing to sanction a rule that would permit an attorney to subordinate the rights of his client to receive fair and honest legal advice and related service to his own selfish interests."), *cert. denied*, 417 U.S. 936 (1974); *Maxwell v. Superior Court of Los Angeles County*, 30 Cal. 3d at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187 (1982) ("We stress that our opinion connotes no moral or ethical approval of life-story fee contracts."); *People v. Corona*, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (1978) ("[T]he conflict of interest unanimously condemned by case law and proscribed by the canons of ethics resulted in obvious prejudice to appellant . . ."); see also Note, *Conflict of Interests When Attorneys Acquire Rights to the Client's Life Story*, 6 J. LEGAL PROF. 299, 306 (1981) (discussing several cases in which, with only one exception, courts have recognized Code of Professional Responsibility's prohibition against publication rights agreements).

<sup>30</sup> 30 Cal. 3d at 627-28, 639 P.2d at 261, 180 Cal. Rptr. at 190-91 (1982) (Richardson, J., dissenting).



decision.”<sup>31</sup> The conflicts may be so serious or so numerous that a defendant cannot foresee the legal consequences.

In *People v. Corona*,<sup>32</sup> another California Appellate Court, recognizing the potential severity of a conflict in such cases, ordered a retrial of Juan Corona after his conviction for murdering twenty-five migrant workers. The court found that Corona’s counsel had been ineffective in failing to investigate the case adequately and in failing to raise the defenses of mental incompetence, legal insanity, or diminished capacity. The court held that the “literary rights contract [resulted in] trial counsel [who] was devoted to two masters with conflicting interests—[the attorney] was forced to choose between his own pocketbook and the best interests of his client, the accused.”<sup>33</sup> The lower court in *Maxwell*, the Richardson dissent in *Maxwell*, and the *Corona* court emphasize that the attorney’s conflict is so overwhelming in such cases that it must taint representation.

The Code of Professional Responsibility’s prohibition on even the appearance of impropriety<sup>34</sup> provides a second argument against such agreements. The public may perceive an attorney who enters into a publication rights agreement as more interested in personal profit from publicity than in zealous representation of his client. In his *Maxwell* dissent, Justice Richardson noted that “[a]lthough a defendant may waive rights which exist for his own benefit, he may not waive rights which belong also to the public generally.”<sup>35</sup> Such agreements undermine the public’s belief in the lawyer as a faithful advocate of his client’s

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<sup>31</sup> *Id.* at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (Bird, C.J., dissenting in part). Chief Justice Bird recommended that the case be remanded on the issue of whether the defendant had been made fully aware of all of his counsel’s potential conflicts. *Id.* at 625, 639 P.2d at 260, 180 Cal. Rptr. at 189.

<sup>32</sup> 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978).

<sup>33</sup> *Id.* at 720, 145 Cal. Rptr. at 915. Under the agreement in this case, the lawyer, Richard Hawk, “was granted exclusive literary and dramatic property rights to Corona’s life story, including the proceedings against him, in return for legal services.” *Id.* at 703, 145 Cal. Rptr. at 903. The agreement resulted in the publication of *Burden of Proof: The Case of Juan Corona*. The court based its reversal on both the general inadequacy of representation and the conflict of interest. The two are related here because if Corona was legally incompetent for purposes of trial, he may have been incompetent to enter the publication rights contract as well.

This case demonstrates a problem lurking in every case involving an attorney-client publication rights contract in which the defenses of mental incompetence, diminished capacity, or legal insanity are available. The attorney will be encouraged to avoid such defenses because the success of the defense might imply that the defendant was legally incompetent to enter the agreement. See *supra* note 15.

<sup>34</sup> “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 9 (1980).

<sup>35</sup> 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194 (1982) (Richardson, J., dissenting) (quoting *People v. Werwee*, 112 Cal. App. 2d 494, 500, 246 P.2d 704, 708 (1952)). Justice Richardson entitled a section of his dissenting opinion “Erosion of Judicial and Professional Integrity.” *Id.* at 631, 639 P.2d at 263, 180 Cal. Rptr. at 193. The *Maxwell* appellate court also discussed the “preservation of judicial integrity.” 101 Cal. App. 735 (opinion omitted), 161 Cal. Rptr. at 860-61 (1980); see also Note, *supra* note 29, at 299 (appearance of

interest. This situation is different from the case of pro se representation,<sup>36</sup> or of an attorney representing multiple defendants,<sup>37</sup> because the conflict arising from publication rights agreements falls squarely between the attorney and his client, and is based on the attorney's recognized self-interest as opposed to his favoring of one client over another. The public cannot help but view such agreements cynically.<sup>38</sup> In light of the importance of the judicial function and a public that may already

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impropriety must be avoided because public's belief in fairness of judicial system is essential to its proper functioning).

<sup>36</sup> See *supra* notes 18-21 and accompanying text.

<sup>37</sup> See *supra* notes 24-27 and accompanying text.

<sup>38</sup> Art Buchwald's comical portrayal of a lawyer selling out his client for the lawyer's personal interest in a publication rights agreement reflects the skepticism with which the public may view such agreements:

This fictitious conversation could take place in many states where a canon forbidding a defense lawyer from sharing in literary rights does not exist:

"Lefty, as you know, we're in the second week of the trial, and I think I've made a pretty strong case for you."

"I ain't complaining. You gave the D.A. a run for his money. I got a feeling the jury is going to come back with a not guilty verdict."

"That's what my editor thinks, too, Lefty. Originally, when we worked out the outline of the book, we thought it would make a better story if I got you off at the end. But now that the press keeps referring to our case as the 'Crime of the Century,' we believe it would be better if you got the electric chair."

"Are you crazy or something? Why would it be better if I got the chair?"

"It's more dramatic if, after a great defense, the jury still finds you guilty. A 'Not Guilty' verdict makes the book anti-climactic and a big letdown, particularly if we're going for a 'Book-of-the-Month' deal."

"Wait a minute. I don't mind you taking your fee out of the literary rights to my trial, but I don't want to fry for it."

"Listen, Lefty, when you came to me, you didn't have a dime. You chose me because I was the best criminal lawyer in the country. But I'm not in this business for my health. I don't want you to go to the chair any more than you do. But if I don't make any money out of this book, I'll have wasted six months of my time."

"Can't you figure out some other way of ending the book without me going to the chair?"

"I could get you life, but every major Hollywood studio is interested in making a movie from the trial. We can't make a big deal unless you get capital punishment. My agent said the difference between you getting life and the chair is worth half a million bucks."

"So what are you going to do?"

"I've got to persuade the jury in my summing up that all our witnesses have been lying through their teeth, and society would be much better off if you paid the ultimate price for your heinous crime. But I have to be subtle about it. I don't want to hurt my reputation in the legal profession."

"I think the whole thing stinks."

"Look, Lefty, I'll even throw in an appeal to the Supreme Court for nothing for you. But my first obligation is to my publishers. After all, they're the ones who are paying me."

"I could have done better with a public defender."

"You know you don't honestly believe that, Lefty. Have you ever heard of a public defender who has won a Pulitzer Prize?"

Buchwald, *Defense for Dollars*, Wash. Post, Apr. 14, 1981, at B1, col. 1.

view lawyers suspiciously,<sup>39</sup> courts should scrupulously "[a]void [e]ven the [a]pppearance of [i]mpropriety."<sup>40</sup>

Another reason to prohibit attorney-client publication rights agreements stems from the risk of prejudice to the defendant if the jury learns of the agreement.<sup>41</sup> Knowledge of the agreement could cause a juror to vote for a guilty verdict because he may believe that an innocent defendant would not enter into such an arrangement. Thus, the publication rights agreement may subject the defendant to potential jury prejudice as well as to inadequate representation.

These risks in turn give rise to a further potential problem: publication rights agreements at the very least provide convicted defendants with a basis for appeal on the ground that the attorney did not represent them zealously enough.<sup>42</sup> Such appeals increase the likelihood of rehearings, further overloading court dockets and straining the judicial system's resources.<sup>43</sup> They also present the difficult question of determining what constitutes prejudicial conduct in violation of the defendant's sixth amendment right to effective assistance of counsel.<sup>44</sup> In a time of crowded dockets, the system need not run such risks, especially

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<sup>39</sup> See generally J. LIEBERMAN, CRISIS AT THE BAR: LAWYER'S UNETHICAL ETHICS AND WHAT TO DO ABOUT IT (1978); Stringfellow, *The Crisis of Confidence and Ethics in the Legal Profession*, 9 CAP. U. L. REV. 1 (1979).

<sup>40</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

<sup>41</sup> In calling the *Maxwell* decision "a step backward in the development of the law of legal ethics," Professor Patterson briefly articulated this point: "An agreement such as this is a de facto announcement of the client's guilt; otherwise, what would be the value of his life story? . . . If you were a jury, what would you think if an agreement like this came out?" 68 A.B.A. J. 406 (1982).

<sup>42</sup> See, e.g., *Wojtowicz v. United States*, 550 F.2d 786 (2d Cir.) (refusing to overturn armed bank robbery conviction even though defendant paid counsel from fund created by selling rights to movie *Dog Day Afternoon*; rehearing ordered on other grounds), *cert. denied*, 431 U.S. 972 (1977); *People v. Fuller*, 21 Ill. App. 3d 437, 437-43, 315 N.E.2d 687, 687-91 (1974) (refusing to reverse murder conviction solely on ground of publication rights agreement). The courts in both cases dismissed the appeals.

<sup>43</sup> See, e.g., *United States v. Hearst*, 739 F.2d 1190 (9th Cir. 1980) (new hearing granted on issue of agreement's effect on counsel). Hearst settled with her attorney out of court before the new hearing. Turner, *Patricia Hearst Drops Attempt to Win New Trial*, N.Y. Times, Jan. 7, 1982, at A15, col. 1. See *supra* note 24; see also *Ray v. Rose*, 491 F.2d 285 (6th Cir.) (evidentiary hearing granted to James Earl Ray to determine whether his counsel's literary rights agreement precluded effective assistance of counsel), *cert. denied*, 417 U.S. 936 (1974), *new trial refused*, 535 F.2d 966 (6th Cir.) (no prejudice demonstrated), *cert. denied*, 429 U.S. 1026 (1976); *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (conviction overturned and new trial ordered due to ineffective counsel).

Estimates of the cost of Corona's new trial range from three to six million dollars, making it at least six times the cost of the first trial. See Turner, *Corona Facing Retrial in Farmworker Deaths*, N.Y. Times, Feb. 21, 1982, at A25, col. 1; *Cory Seeks to Limit Murder Trial Costs*, L.A. Times, Dec. 28, 1981, § I, at 19, col. 2; *New Corona Trial Put at \$3 Million*, L.A. Times, Oct. 3, 1980, § I, at 27, col. 4.

<sup>44</sup> The United States Supreme Court developed the standard for ineffective assistance of counsel in the context of representation of multiple defendants. See *supra* note 24 and accompanying text. The *Hearst* court found the standard applicable to publication rights agree-

when compelling arguments favor an invalidation of such agreements.<sup>45</sup>

#### IV

##### RESPONSE TO THE PROBLEM: "SON OF SAM" STATUTES

New York passed the first statute preventing criminal defendants from accumulating publication funds by recounting their alleged misdeeds. In response to New York City's "Son of Sam" killer,<sup>46</sup> the New York state legislature enacted section 632-a of the New York Executive Code<sup>47</sup> to preclude the "unjust enrichment" that could result from pub-

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ment situations as well. *See also* Maxwell v. Superior Court of Los Angeles County, 30 Cal. 3d at 630, 639 P.2d at 262, 180 Cal. Rptr. at 192 (Richardson, J., dissenting).

In its most recent exposition of the standard, the Supreme Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant . . . must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The Court added, however, that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50. But the definition of, and the distinction between "prejudice" and "adverse effect" remain unclear.

Justice Marshall's partial dissent criticized the Court's standard as "not only unduly harsh, but incurably speculative as well. The appropriate question under the Sixth Amendment is whether an actual, relevant conflict of interests existed during the proceedings. If it did, the conviction must be reversed." *Id.* at 355 (Marshall, J., concurring in part and dissenting in part). Justice Marshall's requirement of a seemingly lesser showing still leaves open the question of what constitutes "an actual relevant conflict of interests." His concession that "the Court's view and mine may not be so far apart," *id.* at 358, highlights the difficulty of defining and applying a standard in such cases.

<sup>45</sup> For a response to this argument, see Note, *supra* note 22, at 892-93.

<sup>46</sup> The New York press dubbed David Berkowitz the "Son of Sam" as a result of the note left behind after the killing Berkowitz committed on April 17 signed "Son of Sam." *See* Winfrey, *'Son of Sam' Case Poses Thorny Issues for Press*, N.Y. Times, Aug. 22, 1977, at 1, col. 1.

<sup>47</sup> N.Y. EXEC. LAW § 632-a (McKinney 1982) provides in pertinent part:

1. Every person . . . contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.
- . . . .
3. Upon dismissal of charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.
4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no ac-

lication rights agreements.<sup>48</sup> Twenty-one other states have enacted statutes that follow the New York format<sup>49</sup> with some slight variations.<sup>50</sup>

The New York law<sup>51</sup> provides that if a criminal defendant enters into a publication rights agreement, the publisher must deposit the defendant's profits with the Crime Victims Compensation Board.<sup>52</sup> If the

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tions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.
- .....
8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the excrow [sic] account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.
- .....
11. Notwithstanding any other provision of law, claims on moneys in the escrow account shall have the following priorities:
  - (a) Payments ordered by the board or a court pursuant to subdivision eight of this section;
  - (b) Subrogation claims of the state pursuant to section six hundred thirty-four of this article in an amount not exceeding one-half of the net amount of the civil judgment obtained by a victim which is payable directly to the victim from the escrow account;
  - (c) Civil judgments of the victims of the crime;
  - (d) Other judgment creditors or persons claiming moneys through the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;
  - (e) The person accused or convicted of the crime.

<sup>48</sup> See *supra* note 5.

<sup>49</sup> See *supra* note 6.

<sup>50</sup> Florida provides the most notable change from the New York approach by distributing the funds differently: 25% of the fund is distributed to the defendant's dependents, up to 25% to the victims or their dependents, and up to 50% to the state for its costs in prosecuting and imprisoning the defendant. For a discussion of the differences among the various statutory schemes, see Note, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255 (1980); *Constitutional Analysis*, *supra* note 10, at 1-3, 12-13. See also Granelli, *The Notoriety-for-Profit Fight*, Nat'l L.J., Mar. 7, 1983, at 6, col. 2 (discussing California legislative proposal to use funds from publication rights agreements for state trial and prison costs).

<sup>51</sup> For a detailed discussion of the mechanics of the New York statute, see *Criminals-Turned-Authors*, *supra* note 10, at 444-49.

<sup>52</sup> Note, however, that these statutes do not prevent lawyers from entering into such agreements. *But see supra* note 8.

defendant is convicted, the board keeps the money in escrow for five years.<sup>53</sup> If the victims of the crimes or their families bring a civil action during that time and win a money judgment, the Board releases the money to them.<sup>54</sup> If the defendant is acquitted, the Board deducts the attorney's fees from the escrow account and pays the remainder to the defendant. Whether the defendant is convicted or acquitted, attorneys may not receive more than one-fifth of the money held in escrow.<sup>55</sup>

Although commentators have debated the constitutionality of "Son of Sam" statutes,<sup>56</sup> these laws have yet to be judicially tested. Congress, for its part, rejected a federal model of the statute because of the alleged constitutional deficiencies.<sup>57</sup> The primary constitutional criticism of these statutes is that they discourage the accused's exercise of free speech.<sup>58</sup> By depriving the defendant of the advance normally paid by

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<sup>53</sup> See N.Y. EXEC. LAW § 632-a(4), *supra* note 47.

<sup>54</sup> This provision helps the crime victims primarily by setting aside money that a previously indigent defendant could dissipate while his case was pending. Victims are normally entitled to a civil judgment even after the state's criminal action, but the defendant usually lacks funds with which to pay damages. The "Son of Sam" statutes make it worthwhile for victims and their families to bring the tort action. Some states also provide state aid to victims of certain crimes. See generally H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME (1974) (detailing programs in 10 states).

<sup>55</sup> See N.Y. EXEC. LAW § 632-a(8), *supra* note 47. New York encountered problems with the original formulation of the "Son of Sam" statute due to the excessive draining of escrow accounts for attorney's fees. See *Book Rights: Ethical Dilemma*, Nat'l L.J., Aug. 24, 1981, at 1, col. 1, at 12, col. 4 ("[C]hief counsel of the New York Crime Victim's Compensation Board said: '... it's not so much a question of the perpetrator being enriched as their attorneys. The real parties at issue are the attorneys and other agents of the perpetrator.'"). In response to this problem, New York amended the statute in 1981, limiting the defendant's attorney's fees to one-fifth of the funds in the account. N.Y. EXEC. LAW § 632-a(8), *supra* note 47.

<sup>56</sup> See *supra* note 10 and accompanying text (attacking the statutes on first amendment grounds). But see Note, *supra* note 50 (justifying statutes on comparative equity grounds).

<sup>57</sup> Prior to the defeat of the amended H.R. 7010 on October 14, 1978, see 124 CONG. REC. 38,277 (1978), the conference committee on the bill rejected a provision patterned on the New York statute. The determining factor in the committee's action was the finding of the American Law Division of the Library of Congress Congressional Research Service that "serious constitutional issues are raised by [the New York] legislation: The main constitutional issues raised concern the due process clause of the 14th amendment and the 1st amendment protection for freedom of speech and press." 124 CONG. REC. 35,739 n.1 (1978).

<sup>58</sup> See *supra* note 10 and accompanying text. Because the defendant's property is subject to a prejudgment confiscation by the Crime Victims Compensation Board without a hearing, the statute is suspect on procedural due process grounds as well. See Note, *Compensating the Victim*, *supra* note 10, at 99-105; Note, *Criminals-Turned-Authors*, *supra* note 10, at 462-65; Jones, *supra* note 10, at 3-6. Two commentators have offered suggestions to rectify the problem. See Note, *Compensating the Victim*, *supra* note 10, at 119-21 (suggesting application of procedural precautions of New York attachment statute, N.Y. CIV. PRAC. LAW §§ 6201-6226 (McKinney 1980)); Note, *supra* note 50, at 272-73 (suggesting application of guidelines from *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

Critics have suggested other less vital challenges to the statutes. They suggest that the statutes also may be void for vagueness. Note, *Compensating the Victim*, *supra* note 10, at 111-12 (impermissible to chill speech in violation of first amendment right to disseminate information); Note, *Criminals-Turned-Authors*, *supra* note 10, at 462-65; Jones, *supra* note 10, at 9 (vagueness may chill willingness of publishers to enter publication agreements). But see Note, *supra*

publishers to cover initial expenses<sup>59</sup> and by reducing his expectation of receiving money for his story,<sup>60</sup> the statutes limit the defendant's ability and incentive to exercise his first amendment rights. This argument relies on Supreme Court cases holding that burdens on the financial arrangements normally accompanying speech may be unconstitutional.<sup>61</sup> An indigent defendant deprived of funds essential to the exercise of his right to speech may assert that such a statute is an impermissible restriction on his first amendment rights.<sup>62</sup>

Defenders of the constitutionality of these statutes argue that the disincentives the statutes place on a defendant's speech are not severe enough to invalidate them.<sup>63</sup> The statutes leave intact many free speech incentives for the defendant. He may pay a private attorney from the funds; he will receive any money remaining in the account at the end of the statute's limitations period<sup>64</sup> or upon acquittal; he may want to provide restitution to the victims of his crimes or their families.<sup>65</sup> Depending on the individual defendants, these incentives may or may not outweigh the disincentives, but they do encourage the defendant to exercise his free speech rights. The statutes do not prevent a defendant from telling his story, but merely remove one potential motive for the defendant to do so. The argument defending the statute's constitutionality characterizes the defendant's speech as "middle-tier" commercial

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note 50, at 264 (arguing that statute poses no such threat because it is "very specific"). One critic suggested that the retroactive application of the statute might violate the contract clause. See Note, *Compensating the Victim*, *supra* note 10, at 97-99. The statute also may violate the equal protection clause because it only compensates victims of violent crimes, not victims of white collar crimes. *Id.* at 118. A further first amendment objection is premised on the impairment of the public's right to know. Because the defendant's story could inform the public and legislators of productive ways to handle child delinquency and criminals, a defendant's choice to forego exercise of free speech will deprive the public of potentially valuable information. Note, *Compensating the Victim*, *supra* note 10, at 105-09. *Contra* Note, *supra* note 50, at 263-64.

<sup>59</sup> See Note, *Criminals-Turned-Authors*, *supra* note 10, at 452.

<sup>60</sup> See *id.* at 451-52; Note, *Compensating the Victim*, *supra* note 10, at 105-12, 120-21; Jones, *supra* note 10, at 8-9.

<sup>61</sup> In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held a provision of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, unconstitutional because it limited campaign expenditures. The Court recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," 424 U.S. at 19, and that constitutional questions are raised if an expenditure limitation prevents a candidate "from amassing the resources necessary for effective advocacy." *Id.* at 21.

<sup>62</sup> See also *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (holding state tax on owners of newspapers with distribution of more than 20,000 copies per week as unconstitutional "device . . . to limit the circulation of information to which the public is entitled").

<sup>63</sup> See Note, *supra* note 50, at 257-71.

<sup>64</sup> *E.g.*, N.Y. EXEC. LAW § 632-a(4), *supra* note 47.

<sup>65</sup> See Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 251 (1965). Gary Gilmore also reportedly requested that a portion of the proceeds from books about him be given to the families of those he murdered. See *2 Murder Victims Had Much in Common*, N.Y. Times, Jan. 18, 1977, at 21, col. 4.

speech and thus draws support from the Supreme Court cases according a lower level of protection for such speech.<sup>66</sup> A statute that marginally limits a defendant's incentives to exercise his profit-motivated speech does not rise to the level of unconstitutionality.

## V

### CONTINGENT FEES IN CRIMINAL CASES WITH PUBLICATION FUNDS AVAILABLE

#### A. The Proposal

Although the first amendment problems with "Son of Sam" statutes may not be as significant as some commentators suggest, Congress has found them serious enough to refuse to pass a comparable statute.<sup>67</sup> Similarly, although the potential conflict of interest in attorney-client publication rights agreements may not support a rule of per se invalidation, the Code of Professional Responsibility bans such agreements<sup>68</sup> and all courts disapprove of them.<sup>69</sup> One solution to these problems would be to allow contingent defense attorney's fees when significant publication funds are available. Such an arrangement would allow the defendant to use his publication proceeds only for his defense, thus preserving the accused's incentive to tell his story, with most of the money held in escrow for the victims.<sup>70</sup>

The defendant and his attorney would contract for the amount of attorney's fees in case of acquittal. The contract would also set the fee if the defendant is convicted of a lesser offense or receives a lighter prison sentence through plea-bargaining<sup>71</sup> or through the attorney's arguments

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<sup>66</sup> See *Breard v. Alexandria*, 341 U.S. 622, 642 (1951) (holding that ordinance prohibiting door-to-door solicitations of magazine subscriptions was permissible on basis of "commercial feature" of the solicitation). Compare *In re Primus*, 436 U.S. 412 (1978) (holding that attorney's offer to represent person without charge as form of political expression was protected by first amendment) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (attorney's solicitation for personal profit unprotected by first amendment). See generally Note, *supra* note 50, at 262-63 (discussing commercial speech doctrine).

<sup>67</sup> See *supra* notes 5, 57 and accompanying text.

<sup>68</sup> See *supra* notes 7-8 and accompanying text.

<sup>69</sup> See *supra* notes 9, 29 and accompanying text.

<sup>70</sup> This arrangement would extend the present rationale of N.Y. EXEC. LAW § 632-a(8), *supra* note 47. Under that provision, up to one-fifth of the proceeds in the account can "be used for the exclusive purpose of retaining legal representation." See *supra* notes 47-55 and accompanying text. The proposal set forth by this Note would further the New York provision's goal of permitting a defendant to use the money only for his defense until the courts resolve his guilt or innocence.

<sup>71</sup> In *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823 (E.D. Pa. 1972), a defense attorney and the defendant failed to account for the possibility of plea-bargaining, rendering the attorney's "contingent fee arrangement . . . valueless unless his client was acquitted." The conflict arose when the attorney failed to advise the defendant of the assistant district attorney's offer of mitigation to second degree murder in return for a guilty plea. The proposal in this Note would greatly minimize the chances of such a conflict because the attor-



for mitigation at trial.<sup>72</sup> If the defendant and his attorney failed to account for the eventual result in the contract, a judge would determine the fees appropriate to the circumstances of the case.<sup>73</sup> The judge would set the fee in accordance with the other fees in the contract, awarding the attorney more money if the charge and the sentence were significantly lighter than the harshest possible result and less money if close to the harshest possible result.<sup>74</sup>

To prevent lawyers from viewing the risks of such arrangements as too high, the statute would also provide a fixed amount that attorneys could receive if the defendant were convicted of the crime with which he was charged. The defendant could bargain for a lesser amount if an attorney would agree to it. The legislature would have to determine the amount needed to induce attorneys to take such cases in view of the amount that should be allocated for the victims.<sup>75</sup>

Thus, if the defendant is convicted, the victims receive all the money remaining in the escrow account after the attorney collects his fee. This fee will be between the statutory amount and zero, depending on the bargain struck between the attorney and the defendant. If acquitted, the defendant would receive all the money remaining after his lawyer collects the agreed upon contingent fee. If the defendant is convicted of a lesser offense or plea-bargains, the attorney would recover fees between the previous two amounts, determined by the contract or a judge, with the victims receiving the remainder.

In those cases where publication funds are insufficient<sup>76</sup> to attract private attorneys or where the defendant cannot attract private counsel

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ney's fee for plea-bargaining would be set forth in a contract or, in the absence of such a clause, by a judge.

<sup>72</sup> The New York scheme seems to preserve at least 80% of the publication profits for the victims and their families even if the defendant is convicted of a lesser charge than the one of which he was accused. See N.Y. EXEC. LAW § 632-a(3), *supra* note 47 (defendant gets fund only if acquitted or if charges are dropped). The victims and their families also receive the money if the defendant is found guilty because of a mental disease or defect. N.Y. EXEC. LAW § 632-a(5), *supra* note 47.

<sup>73</sup> Judges determine attorneys' fees in numerous other areas of the law. See generally Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977) (courts employ various approaches to determine attorneys' fees, but discretion is not unlimited).

<sup>74</sup> A judge might also consider factors such as the number of victims entitled to the money, the judge's evaluation of the attorney's representation in having the penalty mitigated, the total amount of money available, and the effect, if any, of the publication agreement on the attorney's performance. Cf. Berger, *supra* note 73, at 315-28 (discussing factors that courts should account for in determining attorneys' fees).

<sup>75</sup> Even though an attorney risks much time and money in preparing the defense, his profit, if he obtains acquittal, will be determined by the risks taken. Furthermore, the attorney would receive much publicity, and an exceptional performance would enhance his practice regardless of the outcome. The sensational cases might also attract well-known attorneys who can afford an adverse verdict but who value being in the spotlight.

<sup>76</sup> See *supra* note 4.

due to the perceived weakness of his case, a "Son of Sam" statute could still act to preserve money for the victims and their families. The legislature could designate an amount<sup>77</sup> that the defendant's appointed counsel could use for expert witnesses, discovery, and other matters that may need funding in sensational criminal cases.<sup>78</sup> Finally, if the defendant received money for a publication undertaken post-conviction, he would still receive a percentage of the proceeds.<sup>79</sup>

### B. The Advantages of the Proposal

This proposed statutory scheme provides several significant advantages over either attorney-client publication rights agreements or the present "Son of Sam" statutes. The interests of the defense attorney and the defendant would be aligned to minimize, if not eliminate, the conflict of interest problem. Because the attorney's optimum financial gain will be realized from acquittal, there is little chance that he will sacrifice his client's defense for greater publicity. He is no longer guaranteed a substantial sum of money even if he loses. The public perception of the judicial process is also improved because the attorney's interests are more nearly the same as the defendant's. Furthermore, the alignment of interests significantly reduces the chances for a defendant to claim ineffective counsel. Appellate courts will be less likely to face such claims on their already overcrowded dockets and will be spared applying the difficult standard for determining ineffectiveness of counsel.

The proposal further improves "Son of Sam" statutes because the defendant is given a greater incentive to exercise his free speech rights. Defendants firmly believe that private counsel represent them more effectively than do public defenders.<sup>80</sup> The proposed statute uses this be-

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<sup>77</sup> The amount would depend on the balance struck between the amount needed to provide an incentive for the defendant to create money for his defense and the amount that would be left over for the victims if the defendant is convicted. This amount could be the lesser of a percentage of the proceeds and a fixed amount. The percentage would apply if little money were available, whereas the fixed amount would apply if substantial amounts were available. This scheme would preserve money for the victims in either case, but the amount available for the defense would still be limited.

<sup>78</sup> See, e.g., *Ga. Aides Oppose Atlanta Suspect's Legal Fund Plan*, Nat'l L.J., Sept. 14, 1981, at 2, col. 3, at 27, col. 3 (attorneys trying to raise money for Wayne Williams's defense by selling his story and "complain[ing] of a lack of funds to bring in expert witnesses to refute what is expected to be highly technical evidence against their client").

<sup>79</sup> Under N.Y. EXEC. LAW § 632-a(1), *supra* note 47, a convicted person will receive no more proceeds from a publication undertaken post-conviction than an accused. Under the proposal, determining the appropriate percentage of money for the defendant would require balancing the amount necessary to encourage the defendant to tell his story against the amount to be set aside for the victims.

<sup>80</sup> See J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 105-06 (1972) ("Nearly 80 percent of those represented by public defenders felt that their lawyer was not on their side."); O'Brien, Pheterson, Wright & Hostica, *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 299 (1977) (defendants generally consider private counsel "to be superior to both assigned counsel and public defenders").

lief to encourage defendants to tell their stories by permitting them to devote their publication funds to attracting private counsel. Although not completely eliminated, the disincentives to exercising speech will be greatly reduced. Moreover, the state may save money because the defendant will be better able to hire private counsel, eliminating the need for a public defender and reducing the likelihood of retrial and the accompanying exorbitant cost.<sup>81</sup>

Finally, and perhaps most importantly, such an arrangement would comport with notions of justice. Should the defendant be found guilty, most of the money acquired from the media as a result of his crime would go to the victims, but he has still been afforded the opportunity to attract private counsel.<sup>82</sup> Should he be acquitted, he has again had the opportunity to attract effective counsel and will keep that share of the proceeds set by the contract.

Although the Code of Professional Responsibility prohibits contingent fees in criminal cases<sup>83</sup> the rationale behind the Code's prohibition is inapplicable to these types of agreements. The Code contends that "[p]ublic policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee."<sup>84</sup> One commentator found it "doubtful that there [was] any current law on the subject [of contingent fees in criminal cases]."<sup>85</sup> This lack of current law<sup>86</sup> and the

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<sup>81</sup> See *supra* notes 42-45 and accompanying text.

<sup>82</sup> In her partial dissent in *Maxwell v. Superior Court of Los Angeles County*, 30 Cal. 3d 606, 624, 639 P.2d 248, 259, 180 Cal. Rptr. 177, 188 (1982), Chief Justice Bird stated that "hold[ing] any 'life story' agreement, regardless of its contents, impermissible would be to foreclose to the indigent perhaps the only opportunity he may have to secure counsel of his choice. At the same time, counsel should not exploit the circumstances in which the accused finds himself." By permitting a contingent fee in such cases, the state would preserve the indigent's opportunity to secure counsel of his choice while minimizing the risks of counsel exploiting the defendant's circumstances.

<sup>83</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1979). See also MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5(c) (Proposed Final Draft 1981) (derived from DR 2-106(c)).

<sup>84</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20.

<sup>85</sup> F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 52 (1964); see also E. WOOD, FEE CONTRACTS OF LAWYERS 35-36 (1936). But cf. R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 96-97 (1980) (policy prohibits contingent fees in criminal cases because lawyer's temptation to act unethically is too great).

<sup>86</sup> E.g., RESTATEMENT OF CONTRACTS § 542(2) (1932); 6A A. CORBIN, CORBIN ON CONTRACTS § 1424, at 366-68 (1962) (citing primarily cases invalidating contingent fees in divorce cases). The few cases on the subject do not articulate a reason for the ban on such arrangements but declare contingent fees for defense attorneys to be against "public policy." See, e.g., *Genins v. Geiger*, 144 Ga. App. 244, 245, 240 S.E.2d 745, 747 (1977) ("The contractual provision which expressly provides for payment of \$25,000 contingent on a disposition of the criminal charges favorable to appellee-client is void as against public policy."); *Ormerod v. Dearman*, 100 Pa. 561, 563 (1882) ("[T]he alleged [contingent fee] agreement in this case to pay for such services is void, as being against the policy of the law."); cf. *Price v. Caperton*, 1 (Duv.) Ky. 207, 208 (1864) (dictum) ("A contingent fee dependent on conviction ought never

presence of publication money that can function as a res present a strong case for creating a narrow exception to the ban on contingent fees in criminal cases by permitting them when publication funds are available.

In these cases, the Code's rationale for prohibition—lack of a res—does not apply. In his study of contingent fees,<sup>87</sup> MacKinnon<sup>88</sup> states that one reason for the prohibition comes from the "nature of criminal practice" where "[d]efense attorneys typically seek to be paid in advance . . . . After conviction . . . or acquittal, the client will . . . [not] be in a better position to pay a fee."<sup>89</sup> With an escrow account created for the benefit of either the victims of the crime upon conviction or the defendant upon acquittal, such a situation does not exist: the defendant will be in a better position to pay should he be acquitted.

### CONCLUSION

A contingent fee arrangement in such cases is not without problems. Conflicts of interest between the attorney and the defendant are not completely eliminated, and the potential financial benefits to the attorney could induce improper, overzealous representation.<sup>90</sup> Nevertheless, the risks of ineffective representation or the defendant's perception of ineffective representation are substantially reduced when compared to the current situation. To the extent that the defendant's and the attorney's interests are aligned, contingent fee agreements eliminate the appearance of impropriety, reduce the state's defense costs, and prevent increased overcrowding of dockets.

Contingent fees in sensational criminal cases would also improve the present "Son of Sam" statutes by providing the defendant with a better incentive to exercise his right to free speech. By telling his story, the defendant could raise money to attract private attorneys to represent him. This incentive precludes the possible first amendment pitfalls in the present New York statute and supplies more money for the victims if the defendant is convicted.

Statutes confronting the problems created by public interest in sensational crimes must address the following concerns: minimizing the risk of inadequate representation, preventing unjust enrichment to a

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to be permitted to stimulate assistant counsel."); *Baca v. Padilla*, 26 N.M. 223, 229, 190 P. 730, 732 (1920) (contingent fee for *prosecutor* to secure conviction held "abhorrent to the sense of justice and would not . . . be tolerated by any court"); *Peyton v. Margiotti*, 398 Pa. 86, 89, 156 A.2d 865, 868 (1959) (contingent fee to obtain pardon held unenforceable as "against public policy").

<sup>87</sup> F. MACKINNON, *supra* note 85.

<sup>88</sup> Now Judge MacKinnon of the United States Court of Appeals for the District of Columbia Circuit.

<sup>89</sup> F. MACKINNON, *supra* note 85, at 52.

<sup>90</sup> See R. ARONSON, *supra* note 85, at 97.

guilty defendant, compensating victims of crimes committed by indigent defendants, and protecting the constitutional rights of a defendant. Contingent fees in sensational criminal cases best serve these multiple interests.

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